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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

B & R SUPERMARKET, INC., d/b/a MILAM'S MARKET, a Florida corporation, et al., Individually and on Behalf of All Others Similarly Situated, Plaintiffs, vs. VISA, INC., a Delaware corporation, et al., Defendants.	Case No. 3:16-cv-01150-WHA CLASS ACTION PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT AMERICAN EXPRESS COMPANY'S MOTION TO COMPEL ARBITRATION AND TRANSFER VENUE DATE: June 23, 2016 TIME: 8:00 a.m. CTRM: 8 – 19th Floor JUDGE: Hon. William H. Alsup

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STATUTES, RULES AND REGULATIONS

I. STATEMENT OF ISSUES TO BE DECIDED

1. Whether Plaintiffs[1] should be compelled, pursuant to an unconscionable arbitration agreement that many merchants never entered, to arbitrate Sherman Act, Cartwright Act and unjust enrichment claims related to a conspiracy between American Express and more than a dozen other Defendants to shift billions of dollars in liability for certain credit card chargebacks?

2. Whether to contravene the federal policy in favor of efficient resolution of controversies by splintering American Express from Plaintiffs' action and transferring venue?

II. INTRODUCTION

Despite being just one of 18 named co-conspirator Defendants, American Express ("AMEX") seeks to invoke an arbitration clause to bar Plaintiffs from proceeding in this Court. They also invoke a forum selection clause in an effort to transfer venue. But AMEX fails on both counts. AMEX's Motion to Compel Arbitration and Transfer Venue is ill-conceived and, if granted, would result in inefficient litigation and piecemeal consideration of Plaintiffs' well-pleaded claims. Even if the Court granted AMEX's Motion to Compel Arbitration, large parts of Plaintiffs' claims that are not subject to arbitration would still be litigated in this Court – including whether AMEX was a co-conspirator, whether AMEX is jointly and severally liable and to what extent AMEX was involved with, controlled and owned EMVCo. Significantly, AMEX acknowledges that many members of the putative class do not accept its cards, meaning there is no arbitration clause that could be invoked as to those plaintiffs.[2] Plaintiffs also show that the parties did not agree to arbitrate the Cartwright and Sherman Act conspiracy claims, and that the clause itself is substantively and procedurally unconscionable – rendering it unenforceable.

AMEX's motion to sever and transfer the case against it to the Southern District of New York is similarly misguided. Enforcement of the forum selection clause would not be reasonable because the vast majority of the alleged wrongdoing in this case is not governed by the agreement,

[1] B&R Supermarket, Inc. d/b/a Milam's Market and Grove Liquors LLC, and proposed intervening plaintiffs Monsieur Marcel, and rue21.

[2] AMEX concedes there are millions of merchant locations that do not accept AMEX. Dkt. No. 229 at 9 ("the millions of U.S. merchant locations that have accepted Visa, MasterCard and/or Discover cards without accepting American Express cards").

including claims against all other Defendants or claims based on co-conspirator liability. Plaintiffs also demonstrate that the forum selection clause is fundamentally unfair and unreasonable, and thus the presumption of its validity has been rebutted and the clause must be set aside.

Because both the arbitration clause and the forum selection clause in AMEX's Card Acceptance Agreement ("CAA") are inapplicable, AMEX's Motion must be denied in its entirety.

III. FACTUAL OVERVIEW

On March 8, 2016, Plaintiffs[3] filed this class action lawsuit against Defendants[4] on behalf of merchants who have been unlawfully subjected to the Liability Shift for the assessment of MasterCard, Visa, Discover and AMEX credit and charge card chargebacks since October 2015.[5] ¶5. Prior to the Liability Shift, the putative Class typically was not liable for the cost of fraudulent charges in "card present" transactions. ¶¶71-75. But AMEX and its fellow Defendants agreed to an unprecedented change in the system for handling chargebacks for card present transactions. ¶¶74-75. After October 2015, AMEX, the card-issuing banks, and the other Networks decreed that merchants in the Class were liable for chargebacks attributed to any card present chip card transaction not processed on "certified" chip card reading point of sale ("POS") devices. *Id.*; *see also* ¶79.

Plaintiffs allege that AMEX conspired with the other Defendants to shift the liability for these fraudulent charges onto merchants like Plaintiffs under cover of a standard-setting organization named EMVCo. ¶¶8, 20, 58-60, 74-75. Along with the other Network Defendants, AMEX owns an equal share of EMVCo, which implements decisions on a "consensus basis," *i.e.*, through agreement.

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[3] Plaintiffs have moved to intervene additional named plaintiffs, which motion is unopposed by Defendants. Dkt. No. 255. On May 13, 2016, AMEX filed a supplement regarding intervening plaintiffs Monsieur Marcel and rue21. Dkt. No. 256. AMEX makes the same arguments regarding these Plaintiffs as it made in its initial motion.

[4] Visa, Inc.; Visa USA, Inc.; MasterCard International Incorporated; American Express Company; Discover Financial Services; Bank of America, N.A.; Barclays Bank Delaware; Capital One Financial Corporation; Chase Bank USA, National Association; Citibank (South Dakota), N.A.; Citibank, N.A.; PNC Bank, National Association; USAA Savings Bank; U.S. Bank National Association; Wells Fargo Bank, N.A.; EMVCo, LLC; JCB Co. Ltd; and UnionPay.

[5] All references to "¶" and "¶¶" are to the Complaint, filed on March 8, 2016, Dkt. No. 1.

¶20. Plaintiffs' Sherman Antitrust Act, Cartwright Act, and unjust enrichment claims arise from this conspiracy between AMEX and the other Defendants. ¶¶1, 5, 74-75.

Along with the other Defendants, Plaintiffs allege that AMEX knew that Class members would not be able to obtain, install, and have "certified" the necessary equipment and software in time to avoid the Liability Shift. ¶79. Indeed, Plaintiffs allege that AMEX and the other Defendants knew that the "certification" process would take years after the October 2015 Liability Shift to complete, and thus conspired to proceed as they did to achieve supracompetitive profits. ¶¶79, 86.

IV. AMEX'S ARBITRATION ARGUMENT FAILS

A. Legal Standard

Arbitration is a matter of contract, and a "'party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *See Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)). As such, "[a]rbitration . . . is a matter of consent, not coercion." *Volt Info. Scis. Inc. v. Bd. of Trustees*, 489 U.S. 468, 479 (1989). "[A] disagreement about whether an arbitration clause . . . applies to a particular type of controversy is for the court." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). In assessing whether a dispute is arbitrable, courts ask whether the arbitration clause is broad or narrow and whether the arbitration clause encompasses the asserted claim. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-28 (1985); *see also Tracer Research Corp. v. Nat'l Envtl. Servs. Co.*, 42 F.3d 1292, 1294 (9th Cir. 1994).

The burden of proving a valid and enforceable agreement rests on the party seeking to compel arbitration. *Maganallez v. Hilltop Lending Corp.*, 505 F. Supp. 2d 594, 599-600 (N.D. Cal. 2007).[6] As detailed below, AMEX has failed to shoulder that burden.

[6] AMEX's claim that the Supreme Court has blessed the arbitration clause in its CAA, does not answer the question as to whether the clause applies in this case, and in all circumstances. *See* Dkt. No. 229 at 1.

B. The Court Should Not Compel Arbitration

1. Plaintiffs' Co-Conspirator and Joint and Several Liability Claims, as Well as Those Related to AMEX's Ownership of EMVCo Are Not Subject to Arbitration

Plaintiffs' Complaint alleges that AMEX violated federal and state antitrust laws by conspiring with the other Defendants and through co-conspirator Defendant EMVCo. ¶¶5, 20, 74-75, 79, 143-144, 152, 154, 168. As a co-conspirator and co-owner of EMVCo, AMEX may not escape facing Plaintiffs' claims against it. *Id.*; *see also* Dkt. No. 1, Prayer for Relief, §C. Numerous decisions, including those in this District, support the commonsense notion that claims based on joint and several liability of co-conspirators are not subject to arbitration. *See, e.g.*, *Royal Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323, 327 (9th Cir. 1980) (citing *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390 (1906)); Bernay Decl.,[7] Ex. 1 (*In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, slip op. (N.D. Cal. Jan. 10, 2012) (claims against defendant based on co-conspirator liability not subject to arbitration).

In re TFT-LCD (Flat Panel) Antitrust Litigation is instructive. The arbitration claim there was broad. *Id.* at 2 ("If any disagreement or controversy of any kind arises between DISTRIBUTOR and SUPPLIER, the parties will meet to attempt to resolve it"). In that case Judge Illston held:

> the arbitration clause is necessarily limited to disputes arising out of the business relationship between Jaco and NEC. Thus, Jaco's claims are arbitrable to the extent they are based upon purchases it made directly from NEC; ***to the extent Jaco's claims against NEC are based on co-conspirator liability for purchases Jaco made from other defendants, such claims are not subject to arbitration***.

Id., Ex 1 at 2; *Acer Am. Corp. v. Hitachi, Ltd. (In re TFT-LCD (Flat Panel) Antitrust Litig.)*, No. M 07-1827 SI, 2014 U.S. Dist. LEXIS 50526, at *50 (N.D. Cal. Apr. 10, 2014) (same).

Here, Plaintiffs plead violations of the Sherman Act, the Cartwright Act, and a claim for unjust enrichment. Those claims are based in large part on allegations that AMEX, as a co-owner of EMVCo and as a party to Defendants' conspiracy, enacted the Liability Shift. Those claims are thus premised on a theory of co-conspirator liability and should not be subject to arbitration. *Id.*

[7] *See* Declaration of Alexandra S. Bernay in Support of Plaintiffs' Opposition to Defendant American Express Company's Motion to Compel Arbitration and Transfer Venue, filed concurrently herewith ("Bernay Decl.").

2. AMEX Cannot Arbitrate the Claims of the Many Merchants in the Class that Do Not Accept Its Cards but Accept Visa, MasterCard, or Discover

Many merchants in the putative class have been affected by the Liability Shift but do not accept AMEX. Indeed, AMEX's motion concedes that there are "millions of U.S. merchant locations that have accepted Visa, MasterCard and/or Discover cards without accepting American Express cards." Dkt. No. 229 at 9.[8] These merchants, who have not entered into any contract with AMEX, would not be subject to any arbitration agreement as there is no agreement between those class members and AMEX to arbitrate any dispute. *Ross v. Am. Express Co.*, 547 F.3d 137, 143 (2d Cir. 2008). As the Second Circuit held in that class action alleging AMEX conspired to fix foreign currency transaction fees with MasterCard, Visa, and several Issuing Banks:

> Amex has no corporate affiliation with the Issuing Banks; the plaintiffs allege without contradiction that Amex is in fact a ***competitor*** of the Issuing Banks in the credit card market. Amex did not sign the cardholder agreements, it is not mentioned therein, and it had no role in their formation or performance. The plaintiffs did not in any way treat Amex as a party to the cardholder agreements. On the contrary, they do not allege to have treated Amex at all. Just as with BMB in *Sokol Holdings, Inc.*, Amex's only relation with respect to the cardholder agreements was as a third party allegedly attempting to subvert the integrity of the cardholder agreements. In sum, arbitration is a matter of contract and, contractually speaking, the plaintiffs do not know Amex from Adam. Amex therefore cannot avail itself of the arbitration agreements contained in the cardholder agreements.

Id. at 146 (emphasis in original). The same result holds here.

3. The Alleged Conspiracy Between AMEX and the Other Defendants Is Outside the Scope of the Arbitration Agreement

While AMEX asserts claims that Plaintiffs' allegations are encompassed in the arbitration provision (Dkt. No. 229 at 6-7, 9), the Card Acceptance Agreement is limited to bilateral claims between a merchant and AMEX, and it does not encompass the conspiracy among AMEX and multiple other Defendants. Dkt. No. 229-2, Ex. C at 1, §1(c) ("Claim means any claim . . . dispute, or controversy ***between you and us*** . . . ."). Indeed, the Limitations on Arbitration provided in the

[8] To the extent the Court deems it necessary, Plaintiffs are willing to put forth a named plaintiff who does not accept AMEX but has been assessed chargebacks from Visa, MasterCard or Discover cards as a result of AMEX's conspiracy with the other Defendants.

Arbitration Agreement limit an arbitrator's authority to claims between a merchant and AMEX.[9] *Id.*, Ex. H. at 249 ("The arbitrator's authority is limited to Claims between Sponsored Merchant, [insert the term you use to refer to yourself], and American Express."). But Plaintiffs' antitrust conspiracy claims are not limited to Plaintiffs and AMEX – instead they arise from AMEX's anticompetitive conspiracy with ***other*** co-conspirator Defendants. As such, they fall outside the terms of the purported arbitration agreement. *Am. Express Co. v. Italian Colors Rest.*, ___ U.S. ___, 133 S. Ct. 2304, 2309 (2013) (recognizing that arbitration agreements should be enforced according to their terms); *Knutson*, 771 F.3d at 565; *Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511, 1516 (10th Cir. 1995) ("A dispute within the scope of the contract is still a condition precedent to the involuntary arbitration of antitrust claims").

Because Plaintiffs have claims based on co-conspirator liability, and because Plaintiffs also allege AMEX is liable through its co-ownership of EMVCo, reference to card acceptance agreements or the merchant regulations is neither necessary nor integral. *See, e.g.*, *Fazio v. Lehman Bros. Inc.*, 340 F.3d 386, 395 (6th Cir. 2003) ("A proper method of analysis here is to ask if an action could be maintained without reference to the contract or relationship at issue. If it could, it is likely outside the scope of the arbitration agreement."); *Santa Cruz Med. Clinic v. Dominican Santa Cruz Hosp.*, No. C 93-20613 RMW (EAI), 1995 WL 232410, at *3 (N.D. Cal. Apr. 17, 1995) (denying motion to compel and saying the "claims are not arbitrable because no language in the contracts . . . needs to be interpreted in order to evaluate the merits of plaintiffs' antitrust claims").

[9] The introduction to the *Arbitration Agreement (as to Claims involving American Express)* states that "[i]n the event that Sponsored Merchant or [insert the term you use to refer to yourself] is not able to resolve a Claim against American Express, or a claim against [insert the term you use to refer to yourself] ***or any other entity that has a right to join in resolving a Claim***, this section explains how Claims can be resolved through arbitration." Dkt. No. 229-2, Ex. H at 249. But AMEX does not have a right to join co-conspirators to an antitrust conspiracy. *Ward v. Apple Inc.*, 791 F.3d 1041, 1049 (9th Cir. 2015) ("an absent antitrust co-conspirator generally will not be a required party under Rule 19(a)(1)(A), which applies only when a party's absence prevents the court from 'accord[ing] complete relief among existing parties'"); *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 330 (1955) (holding that joinder of alleged antitrust co-conspirators was not required "since as joint tortfeasors they were not indispensable parties"). Unless otherwise noted, citations are omitted and emphasis is added, here and throughout.

4. The Arbitration Agreement and Its Delegation Provision Are Procedurally and Substantively Unconscionable

As a generally applicable contract defense, unconscionability provides grounds for revoking a contract. *Circuit City Stores v. Adams*, 279 F.3d 889, 895 (9th Cir. 2002). ("Because unconscionability is a defense to contracts generally and does not single out arbitration agreements for special scrutiny, it is . . . a valid reason not to enforce an arbitration agreement under the FAA."); *see also Kilgore v. KeyBank N.A.*, 673 F.3d 947, 963 (9th Cir. 2012), *on reh'g*, 718 F.3d 1052 (9th Cir. 2013) (*en banc*) (describing the viability of unconscionability as a defense to arbitration clauses). In light of the unequal bargaining power between AMEX and Plaintiffs and the lack of a clear and unmistakable agreement to the contrary, any unconscionability determination is for the Court to make. *Moody v. Metal Supermarket Franchising Am. Inc.*, No. C 13-5098 PJH, 2014 WL 988811, at *3 (N.D. Cal. Mar. 10, 2014) ("The court finds that the Agreements' general reference to the 'then current commercial arbitration rules of the AAA' is not [a] 'clear and unmistakable' delegation . . ., and thus finds that the threshold question of arbitrability remains with the court."); *but see Brennan v. Opus Bank*, 796 F.3d 1125, 1130-31 (9th Cir. 2015).

Like the arbitration clause in *Moody*, the operative language of the 260-page agreement here merely lists, deep on page 249, that the arbitral rules of the AAA or JAMS in effect when a claim is filed apply unless they conflict with the agreement. Dkt. No. 229-2, Ex. H at 249. Yet, these rules were neither included nor attached to the arbitration agreement. *E.g.*, *id.* Both the AAA and JAMS have multiple sets of rules and AMEX never specified which set of rules it was referencing.

Defendants insist that New York law must apply in assessing whether the arbitration clause is unconscionable. Dkt. No. 229 at 8. Plaintiffs don't necessarily agree, but unconscionability under California law is generally in accord with New York law. *Koffler Elec. Mech. Apparatus Repair, Inc. v. Wärtsilä N. Am., Inc.*, No. C-11-0052 EMC, 2011 U.S. Dist. LEXIS 34851, at *6, *21-*22 (N.D. Cal. Mar. 24, 2011) (finding New York and California law functionally the same in relation to unconscionability determination). The jurisdictions each require a contract to be both procedurally and substantively unconscionable to be rendered invalid. *Id.*; *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 922 (9th Cir. 2013); *Ciago v. Ameriquest Mortg. Co.*, 295 F. Supp. 2d 324, 328 (S.D.N.Y.

2003) (under New York law, a determination of unconscionability generally requires both procedural and substantive unconscionability). A "'sliding scale'" test of procedural and substantive unconscionability is applied. *Id.*; *see also State v. Wolowitz*, 96 A.D. 2d 47, 68 (N.Y. App. Div. 1983).

Here, the arbitration provision is both procedurally and substantively unconscionable.

a. The Arbitration Agreement Is Procedurally Unconscionable

AMEX's take-it-or-leave arbitration agreement is procedurally unconscionable. It is a testament to the disparity in bargaining power between AMEX, a multinational corporation that conducts business throughout the United States, and Plaintiffs – who are faced with the Hobson's choice of either agreeing to arbitrate or give up accepting AMEX. Dkt. No. 229 at 8. Where, as here, a party lacks a meaningful choice, but must acquiesce to the proffered terms – which AMEX may and does unilaterally amend – the provision is procedurally unconscionable. *Brennan v. Bally Total Fitness*, 198 F. Supp. 2d 377, 382 (S.D.N.Y. 2002). Defendants' assertion that Plaintiffs could have chosen not to accept AMEX cards ignores that most retailers, particularly an industry with the slim margins typical of grocery markets, need to accept all credit cards.[10]

b. The Arbitration Agreement Is Substantively Unconscionable

AMEX points to an illusory parity in arguing its arbitration clause is not substantively unconscionable. Dkt. No. 229 at 9. Apart from pointing to the text of the arbitration agreement and the "sterling" reputations of JAMS and the AAA, AMEX fails to provide any support that arbitration in practice is fair to merchants. *Id.* For example, both AMEX and Plaintiffs are purportedly barred from instituting a class action, but this bar realistically only impacts Plaintiffs as it would be exceedingly unlikely AMEX would ever seek to file a class action. Plaintiffs should be provided an opportunity to test issues of substantive unconscionability through discovery. In any event, the arbitration agreement is substantively unconscionable because it may block or inappropriately limit

[10] For the same reasons, the arbitration clause is procedurally unconscionable as to rue21 and Monsieur Marcel.

discovery and require application of New York law, thereby precluding Plaintiffs' claims under federal and California law.

(1) By Requiring the Arbitrator to Apply New York Law, the Arbitration Agreement Impermissibly Excludes Plaintiffs' Federal Antitrust and California Cartwright Act Claims

The agreement's Governing Law provision mandates application of New York law. *See* Dkt. No. 229-2, Ex. C at 7 ("The Agreement and all Claims are governed by and shall be construed and enforced according to the laws of the State of New York without regard to internal principles of conflicts of law"). Indeed, the arbitration provision states: "The arbitrator shall apply New York law and applicable statutes of limitations and shall honor claims of privilege recognized by law." *Id.*, Ex. C at 6. Plaintiffs' claims, however, arise under ***federal*** (the Sherman Act and the Clayton Act) and ***California*** (Cartwright Act) statutes, not New York law. *Id.*, Ex. H at 251; *id.*, Ex. C at 6. Therefore and significantly, the parties did not agree to submit the antitrust claims at issue in this litigation – which are not governed by New York's law – to arbitration. *Id.*; *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) ("In determining whether statutory claims may be arbitrated, we first ask whether the parties agreed to submit their claims to arbitration . . . .").

Moreover, an arbitrator applying "New York law" could not recognize Plaintiffs' Sherman Act and Clayton Act claims because federal courts have exclusive jurisdiction over Sherman Act and Clayton Act claims. 15 U.S.C. §15; *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985) ("federal antitrust claims are within the exclusive jurisdiction of the federal courts"); *Gen. Inv. Co. v. Lake Shore & M. S. R. Co.*, 260 U.S. 261, 287 (1922) ("This right to sue, however, is granted in terms which show that it is to be exercised only in a 'court of the United States.' This suit was brought in a state court, and in so far as its purpose was to enjoin a violation of the Sherman Anti-Trust Act that court could not entertain it. The situation was the same in respect of the purpose to enjoin a violation of the Clayton Act."); *see also Turf Paradise, Inc. v. Ariz. Downs*, 670 F.2d 813, 821 (9th Cir. 1982) ("there is no concurrent state and federal jurisdiction over the federal antitrust claims. The federal courts have exclusive jurisdiction over federal antitrust claims").

While the arbitration provision grants the arbitrators authority to award any relief available in court, it also states that the "arbitrator shall have no power or authority to alter the Agreement or any of its separate provisions." Dkt. No. 229-2, Ex. H. at 250; *id.*, Ex. C at 6. Since the arbitrator is limited to applying New York law, the Governing Law provision impermissibly waives Plaintiffs' substantive rights under the Sherman Act, Clayton Act, and California's Cartwright Act. *Am. Express Co.*, 133 S. Ct. at 2310 (prospective waiver of right to pursue statutory remedies prohibited). Conversely, the arbitration provision does not contemplate an agreement between the parties to litigate federal antitrust claims – especially in this case where AMEX is alleged to have participated in a conspiracy with the other Defendants to commit such antitrust violations. Accordingly, there is no agreement to arbitrate federal antitrust claims.

(2) The Arbitration Provision Precludes Discovery

Plaintiffs will be hamstrung if forced to arbitrate under the agreement's terms. The arbitration provision grants discovery only if a claim is for more than $100,000. In the words of the arbitration provision: "If a Claim is for $10,000 or less, Sponsored Merchant or American Express may choose whether the arbitration will be conducted solely on the basis of documents submitted to the arbitrator, through a telephonic hearing, or by an in-person hearing as established by the rules of the selected arbitration organization." Dkt. No. 229-2, Ex. H at 251. The arbitration provision provides no mention of discovery as to claims below $100,000:

> If a Claim is for $100,000 or more, or includes a request for injunctive relief, (a) any party to this Agreement shall be entitled to reasonable document and deposition discovery, including (x) reasonable discovery of electronically stored information, as approved by the arbitrator, who shall consider, inter alia, whether the discovery sought from one party is proportional to the discovery received by another party, and (y) no less than five depositions per party. . . . .

Id.

AAA's and JAMS's arbitration rules also place strict limits on discovery. Only in "exceptional cases" does the AAA permit depositions:

> In exceptional cases, at the discretion of the arbitrator, upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator may order depositions to obtain the testimony of a person who may possess information determined by the arbitrator to be relevant and material to the outcome of the case. The arbitrator may allocate the cost of taking such a deposition.

Bernay Decl., Ex. 2 (American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures (Including Rules for Large Complex Commercial Disputes), L-3(f) (Oct. 1, 2013)). Similarly, JAMS limits a party to a single deposition unless a showing of "reasonable need" is made:

> Each Party may take one deposition of an opposing Party or of one individual under the control of the opposing Party. The Parties shall attempt to agree on the time, location and duration of the deposition. If the Parties do not agree, these issues shall be determined by the Arbitrator. The necessity of additional depositions shall be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness.

Id., Ex. 3 (Judicial Arbitration and Mediation Services, JAMS Comprehensive Arbitration Rules, Rule 17(b) (July 1, 2014)).

These purported rules render the agreement substantively unconscionable because antitrust cases typically require far more than the scant discovery provided for in the arbitration provision.

V. AMEX'S VENUE ARGUMENTS ARE INAPT

A. Legal Standard

AMEX, which earns millions from California merchants annually, does not claim that venue is improper, but instead urges the Court to disturb Plaintiffs' choice of venue by severing Plaintiffs' joint and several liability claims arising out of an antitrust conspiracy and transferring them to the Southern District of New York to litigate against AMEX alone. *See* Dkt. No. 229 at 1. AMEX moves for transfer under 28 U.S.C. §1404(a), which states that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

The Ninth Circuit has held that "as a general matter, the district court is not required to 'determine the best venue,' . . . and transfer under §1404(a) 'should not be freely granted.'" *Gherebi v. Bush*, 352 F.3d 1278, 1303 (9th Cir. 2003). "[D]efendant must make a strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum." *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986). A forum selection clause is only one

of many factors in a §1404(a) analysis and certainly not a dispositive one. *See Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 31 (1988).[11]

B. AMEX's Arguments Regarding Venue Fail

1. Plaintiffs' Claims Are Outside the Scope of the Forum Selection Clause

In addressing venue in a diversity case, the threshold issue is to determine the scope of the forum selection clause. *See Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 512-13 (9th Cir. 1988) ("enforcement of a forum clause necessarily entails interpretation of the clause before it can be enforced"). In assessing scope, "[e]xamination of the merits of any of the claims or defenses need not be made [as a] forum selection clause 'establishes a legal right which is analytically distinct from the rights being asserted in the dispute to which it is addressed.'" *Farmland Indus., Inc. v. Frazier-Parrott Commodities, Inc.*, 806 F.2d 848, 850 (8th Cir. 1986) (quoting *Coastal Steel Corp. v. Tilgham Wheelabrator, Ltd.*, 709 F.2d 190, 195 (3d Cir. 1983)).

In this case, Plaintiffs assert antitrust and other claims against 18 Defendants for their roles in a conspiracy that caused injury to Plaintiffs and the class. ¶¶1-22, 29-33. Fully ***17*** of the Defendants are ***not*** subject to the Card Acceptance Agreements between Plaintiffs and AMEX that contain the forum selection clause. *See* Bernay Decl., Ex. 4 at 1 (Agreement for American Express Card Acceptance) ("This Agreement is by and between American Express Travel Related Services Company, Inc., a New York corporation, and you, the Merchant."). The Complaint alleges that 18 Defendants conspired through a continuing agreement, understanding, or concerted action between and among themselves outside of the agreement between plaintiffs and AMEX. ¶¶143, 152. Plaintiffs could not have anticipated that AMEX would participate in an elaborate scheme of concerted actions with 17 other Defendants, or the impracticality of litigating claims with joint and several liabilities solely against AMEX in New York resulting therefrom. *See Farmland*, 806 F.2d at 852.

[11] AMEX's reliance on *Atl. Marine Constr. Co. v. United States Dist. Court*, is inapposite as the Supreme Court "presupposes a contractually valid forum-selection clause" in the §1404(a) analysis in that case. *See* ___ U.S. ___, 134 S. Ct. 568, 581 n.5 (2013).

In *Farmland*, the Eighth Circuit assessed a substantially similar forum selection clause and held that allegations of an elaborate scheme with multiple defendants were not subject to the agreement.[12] *See id.* at 852 (affirming district court's finding that "under the circumstances, enforcement of the forum selection clause would not be reasonable"); *see also In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, MDL No. 1827, 2014 U.S. Dist. LEXIS 55234, at *75-*76 (N.D. Cal. Apr. 14, 2014) (finding that "vast majority of the alleged wrongdoing in this case is not governed by the agreement" containing the forum selection clause as the agreement does not cover claims against all other defendants or "claims based on co-conspirator liability"). The same result should obtain here.

2. The Forum Selection Clause Is Not Valid

Here, AMEX's forum selection clause is not contractually valid and not enforceable as it is unreasonable and fundamentally unfair. *See E. Bay Women's Health, Inc. v. gloStream, Inc.*, No. C 14-00712 WHA, 2014 U.S. Dist. LEXIS 55846, at *3-*4 (N.D. Cal. Apr. 21, 2014) ("*gloStream*") ("A forum-selection clause is presumptively valid and should not be set aside unless the party challenging enforcement of the clause can prove that it is unreasonable and fundamentally unfair.") (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-95 (1991)).

When a forum selection clause is fundamentally unfair or unreasonable, the presumption of its validity is rebutted and the clause must be set aside. *See gloStream*, 2014 U.S. Dist. LEXIS 55846, at *3-*4 (citing *Carnival Cruise Lines*, 499 U.S. at 593-95). AMEX's forum selection clause suffers from both defects of being fundamentally unfair and unreasonable, and as a result, should not be enforced.

[12] In *Farmland*, the forum selection clause stated: "'[Plaintiff] agrees to bring any judicial action, including any complaint, counterclaim, cross-claim or third party complaint, arising directly, indirectly, or otherwise in connection with, out of, related to or from this Agreement or any transaction covered hereby or otherwise arising in connection with the relationship between the parties including any action by [plaintiff] against [defendant] or any person who is an officer, agent, employee or associated person of [defendant] at the time the cause of action arises, only in courts located within Cook County, Illinois, unless [defendant] voluntarily in writing expressly submits to another jurisdiction. . . .'" 806 F.2d at 849.

a. The Forum Selection Clause Is Fundamentally Unfair Without Adequate Notice

For a forum selection clause to "comport with fundamental fairness," it needs to provide sufficient notice to the parties subject to the clause.[13] *See Mason*, 2008 U.S. Dist. LEXIS 68575, at *6 (citing *Carnival Cruise Lines*, 499 U.S. at 595 and *Wallis ex rel. Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 839-40 (9th Cir. 2002)). Here, AMEX's forum selection clause is ambiguous and confusing and cannot provide adequate notice of forum selection. *See Mason*, 2008 U.S. Dist. LEXIS 68575, at *7-*9.

In its motion, AMEX suggests that the forum selection issue comes into play only if the Court does not enforce the arbitration clause. *See* Dkt. No. 229 at 11. The forum selection clause in the Card Acceptance Agreement states: "Subject to section 7 of the General Provisions, any action by either party hereunder shall be brought only in the appropriate federal or state court located in the County and State of New York." Dkt. No. 229-2, Ex. B. In turn, section 7's arbitration provision states "if any portion of these ***Limitations on Arbitration*** is deemed invalid or unenforceable, then the entire Arbitration provision . . . will not apply." Bernay Decl., Ex 4 at 6 (emphasis in original). In effect, without the Arbitration provision, section 7 – the section that the forum selection clause is conditioned upon – is left with solely the mediation provision as a form of dispute resolution.[14] As such, in the event that the arbitration clause is not enforced, the forum selection clause is ambiguous concerning an antitrust class action such as this and does not mandate such action to be brought in any particular forum.

"As with all contracts, any ambiguity is to be construed against the drafter." *Hendrickson v. Octagon Inc.*, No. C 14-01416 CRB, 2014 U.S. Dist. LEXIS 83035, at *6 (N.D. Cal. Jun. 17, 2014)

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[13] Although a "'take it or leave it'" contract without meaningful negotiation does not cause the forum selection clause to be unenforceable, such clauses "are subject to judicial scrutiny for fundamental fairness." *See gloStream*, 2014 U.S. Dist. LEXIS 55846, at *11-*12; *Mason v. CreditAnswers, LLC*, No. 07cv1919-L(POR), 2008 U.S. Dist. LEXIS 68575, at *6 (S.D. Cal. Sept. 5, 2008). The Ninth Circuit noted that "[i]n the absence of arms length negotiations and equal bargaining position, such terms are usually unconscionable." *See Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 n.15 (9th Cir. 2000).

[14] Section 7 of the General Provisions contains only five subsections: (a) Notice of Claim; (b) Mediation; (c) Arbitration; (d) Definition; and (e) Continuation. Bernay Decl., Ex 4.

(citing *InterPetrol Berm. Ltd., v. Kaiser Aluminum Int'l Corp.*, 719 F.2d, 992, 998 (9th Cir. 1983)). AMEX's forum selection clause failed to designate a forum in the event that an arbitration clause is held unenforceable, and to transfer venue on the basis of an ambiguous forum selection clause would require the Court to fill in the blank for the drafter. *See id.* at *9 (stating that "[t]his Court is neither empowered" nor inclined "to fill in the blanks and interpret the [forum selection clause]") (citing *N. Cal. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co.*, 69 F.3d 1034, 1037 (9th Cir. 1995)).

b. The Forum Selection Clause Is Unreasonable

A forum selection clause is considered "'unreasonable'" when its enforcement contravenes "a strong public policy of the forum in which suit is brought." *See gloStream*, 2014 U.S. Dist. LEXIS 55846, at *3-*4. A forum selection clause that strips away a non-waivable statutory claim and causes a claimant to forfeit his statutory right is "contrary to the strong public policy of California and will not be enforced." *See Perry v. AT&T Mobility LLC*, No. C 11-01488 SI, 2011 U.S. Dist. LEXIS 102334, at *15 (N. D. Cal. Sept. 12, 2011) (stating "California courts will enforce adequate forum selection clauses that apply to non-waivable statutory claims, because such clauses does not waive the claims, they simply submit their resolution to another forum"). Indeed, AMEX's choice of law and choice of forum clauses here work in tandem to strip away Plaintiffs' Sherman Antitrust Act and Cartwright Act claims:

> The Agreement and all Claims are governed by and shall be construed and enforced according to the laws of the State of New York without regard to internal principles of conflict of law. Subject to section 7,[15] any action by either party hereunder shall be brought only in the appropriate federal or state court located in the County and State of New York.

Bernay Decl., Ex. 4 at 7.

Despite AMEX's efforts, "the enforceability of the forum selection clause cannot be divorced from the choice of law question," as Plaintiffs' rights and claims under the federal Sherman Antitrust Act and California's Cartwright Act would certainly be stripped by the combination of mandatory application of New York laws in a New York forum. *See Perry*, 2011 U.S. Dist. LEXIS 102334, at

[15] The October 2015 Amendment to the AMEX Card Acceptant Agreement revised "Subject to Section 7" to "Subject to Section 7 of the General Provisions." *See* Dkt. No. 229-2, Ex. B.

*12-*13. As the California Supreme Court emphasized, the state enacted the Cartwright Act to protect its citizens from "the burgeoning power of monopolies and cartels" and ensuring "the unrestrained interaction of competitive forces [to] yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress." *In re Cipro Cases I & II*, 61 Cal. 4th 116, 136 (2015). As such, ""'every trust is unlawful, against public policy and void"'" and "[a]greements in violation of the act are 'absolutely void and . . . not enforceable at law or in equity.'" *Id*. Similarly, remedies under the Sherman Antitrust Act are mandatory and unwaivable. *See Kristian v. Comcast Corp.*, 446 F.3d 25, 47-48 (1st Cir. 2006) (citing *Gains v. Carrollton Tobacco Bd. of Trade, Inc.*, 386 F.2d 757, 759 (6th Cir. 1967).

Given the foregoing, the Court should consider both the choice-of-law and choice-of-forum clauses in determining the unenforceability of AMEX's forum selection clause as against California's strong public policy in protecting its citizens from the cartel formed by Defendants. *See Perry*, 2011 U.S. Dist. LEXIS 102334, at *12-*13 ("explaining that, where antitrust violations are alleged, the Supreme Court would have 'little hesitation in condemning' such an agreement 'as against public policy'") (citing *Mitsubishi Motors Corp*, 473 U.S. at 637 n.19). Such consideration is of utmost importance as the Supreme Court noted that "a §1404(a) transfer of venue will not carry with it the original venue's choice-of-law rules – a factor that in some circumstances may affect public-interest considerations." *See Atl. Marine Constr.*, 134 S. Ct. at 582.

3. Public Interest Factors Outweigh the Forum Selection Clause

AMEX's forum selection clause is invalid, but regardless of its validity, the public interest factors in this case outweigh the clause's application. *See id*. (finding that "it is 'conceivable in a particular case' that the district court 'would refuse to transfer a case notwithstanding the counterweight of a forum-selection clause'"). Public interest factors include "'efficient resolution of controversies,'" promotion of complete and consistent dispute adjudication, and "local interest in resolving the controversy" – all of which are implicated in this case. *See TFT-LCD (Flat Panel) Antitrust Litig.*, 2014 U.S. Dist. LEXIS 55234, at *75-*76; *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. MDL 1917, No. C 07-5944 SC, 2014 U.S. Dist. LEXIS 78901, at *92 (N.D. Cal. Jun. 9, 2014).

Here, all of Plaintiffs' claims arise out of the same conspiracy among the several Defendants. ¶126. Defendants' liabilities are joint and several. Dkt. No. 1, Prayer for Relief, §C. Severing AMEX's claims and trying them in separate districts based on an identical set of facts and law would not only be inefficient and duplicative – unnecessarily burdening of two district courts with heavy dockets – but also would risk inconsistent and incomplete judgments. Losing claims relating to AMEX – a significant member of the cartel – would not promote the local interest of protecting California citizens by reining in the burgeoning power of cartels. As such, courts adjudicating similar complex actions have routinely denied requests made by one out of many defendants to sever and transfer. *See, e.g.*, *Bronstein v. United States Customs & Border Prot.*, No. 15-cv-02399-JST, 2016 U.S. Dist. LEXIS 28998, at *14-*16 (N.D. Cal. Mar. 7, 2016) (denying motion to sever and transfer despite forum selection clause as piecemeal litigation "contravenes the federal policy in favor of 'efficient resolution of controversies'") (collecting cases); *TFT-LCD (Flat Panel) Antitrust Litig.*, 2014 U.S. Dist. LEXIS 55234, at *76 (refusing to enforce forum selection clause as trying one defendant's claims separately from all of the other defendants' similar claims would be "'needlessly inconvenient and burdensome'" and contravenes federal policy of promoting the consistent and complete adjudication of disputes).

The Court in *In re TFT-LCD (Flat Panel) Antitrust Litig*., No. M 07-1827 SI, slip op. (N.D. Cal. Feb. 6, 2012) faced an analogous issue and declined to enforce the forum selection clause in a multi-defendant, multi-claim case. Bernay Decl., Ex. 5. As Judge Illston noted:

> Enforcing the forum selection clauses would therefore splinter [Plaintiffs'] federal- and state-law claims, claims which overlap to a significant degree. This would be "needlessly inconvenient and burdensome [and] plainly contrary to the policy of the federal judiciary of promoting the consistent and complete adjudication of disputes."

Id. at 2.

In light of the fact that AMEX's forum selection clause: (1) does not encompass the claims of this case; (2) is ambiguous and fundamentally unfair; (3) contravenes California's strong public policies; and (4) is outweighed by public interest factors, the Court should find the clause unenforceable and deny AMEX's motion to transfer.

VI. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request the Court deny AMEX's Motion to Compel Arbitration and Transfer Venue. If the Court does not deny AMEX's Motion to Compel Arbitration, Plaintiffs respectfully request the Court permit limited discovery to develop a factual record on contract formation unconscionability.

DATED: May 19, 2016

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CERTIFICATE OF SERVICE

I, the undersigned, declare:

3. On May 19, 2016, I authorized the electronic filing of the PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT AMERICAN EXPRESS COMPANY'S MOTION TO COMPEL ARBITRATION AND TRANSFER VENUE with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List.

4. Declarant also caused the foregoing document to be served by depositing a true copy thereof in a United States mailbox at San Diego, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed below. There is a regular communication by mail between the places of mailing and the places so addressed.

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I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on May 19, 2016.

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